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EDITORIAL.

CHANGE OF COMMENCEMENT DAY.

It has long been desired to secure a more eligible time for the Law School Commencement, than that at which it has hitherto taken place. The weather in Carlisle is apt to be torrid in the first week of June, and Bosler Hall, exposed on roof and two flanks to the sun, sometimes becomes a veritable furnace in the afternoon. The citizens of the town too are busy in that part of the day, and can only with inconvenience quit their avocations to witness commencement exercises. At length the other portions of the program for the week have been so arranged that Tuesday evening may now be appropriated by the Law School. The change will be in all ways desirable. The temperature will be better, and the audience will be larger. Hon. Wm. B. Hornblower, the distinguished orator, has signified his approval of the hour selected, and all indications foretell a very pleasant commencement.

THE SCHOOL.

A. J. Feight, post-grad., '97, has joined the Governor's Troop.

We are glad to note a marked improvement in the condition of the reading-room since the recent lecture on the subject.

Chas. E. Daniels, '98, has left school to act as war correspondent of the *Scranton Truth* during the continuance of the war with Spain.

Among the students who have enlisted in the National Guard of Pennsylvania are Chas. E Shalters, '98, Chas. E. Horn, '99, Clarence R. Gilliland, '99, Hugh Miller, post-grad. '97, Adair Herman, '98, G. Fred. Vowinckle, '98, A. M. Devall, '98, Miles H. Murr, '98, Garrett B. Stevens, '99.

A large number of the students enjoyed the most able and entertaining lecture given by Hon. John Stewart, of Chambersburg, on the subject, "Our Struggle for a Continent," in the Second Presbyterian church, April 22d.

The regular bi-monthly examinations on Real Property and Contracts were held recently.

Garrett B. Stevens, '98, was in Philadelphia April 30th.

Merkel Landis, '99, visited his brother, at Flemington, N. J., recently.

The Juniors defeated the Seniors in an interesting game of base-ball, played Saturday April 30th, the score being 27 to 8. The second game of the series will be played in a few days.

Many of the Law School "braves" are contemplating offering their services in behalf of their country in addition to those who are now on active duty.

Though not officially reported, it is pretty generally known, that on a grassy plot in Milford, Del., during their recent trip, the members of the Glee Club defeated those of the Orchestra in a game of foot-ball. The score, 9 to 0, was the result of a forfeiture, caused by the old failing of the Orchestra—discord.

The members of the Law School united with the citizens of the town in giving a great send-off to the Gobin Guards on the occasion of their departure for Camp Hastings. The procession of law students was headed by John B. T. Caldwell, '98, mounted marshal, followed by a fife and drum corps, and the body of students, under the command of G. Fred. Vowinckle, '98.

The dramatic talent of the Law School was called upon by the Gobin Guards, the military company of Carlisle, to assist them in their production of The Drummer Boy of Shiloh. Those assisting were Caldwell, Moser and Moyer, '98, and McEwen, '00.

During the last month Dean Trickett has issued the second volume of his "Borough Laws." This work is a continuation of his former edition on the same subject, and embraces the law from 1893 to date. The high character of his work is maintained in this, his latest effort.

ORCHESTRA AND GLEE CLUB TRIP.

Again we burden the readers of the FORUM with an account of a trip recently taken by the Orchestra and Glee Club, but the Law School members, Messrs. Snyder, Berntheisel, Vowinckle, Hare, Devall, Stevens, Sellers and Weeks report such a magnificent time that we think it necessary to devote some little space to it. The route, which included the towns of Steelton and Lancaster, Pa., Wilmington, Dover and Milford, Del., and Denton and Baltimore, Md., seemed to be a happy one, for at each place the boys were most enthusiastically received. At Dover, the club sang before the Delaware Legislature and was roundly applauded by that august body. Receptions to the number of five were lavished upon this exceptional organization and those at Wilmington, Milford and Baltimore are worthy of special mention as showing to good advantage the hospitality of this Dickinson locality. At Wilmington Chief Justice Lore entertained the boys and in a most enthusiastic speech sounded the praises of the Dickinson School of Law and expressed his high appreciation of the welcome which he received in Carlisle last Commencement.

At Milford, Mr. Holland, a trustee of the College, amid festoons of red and white, received the club in his beautiful home. But at Baltimore! at Baltimore, there the fellows say they had a great time and we refuse to doubt it upon hearing that they appeared before the students of the Woman's College exclusively and that after the concert, at the reception given in the elaborately decorated gymnasium, they had seven beautiful girls apiece. We decline to report further.

ALUMNI PERSONALS.

If Dickinson College would be proud of any alumnus, and if the Law School would rejoice in the patronage of any one man, it should be that distinguished citizen, Chief Justice Lore. While he is greatly honored in his native State, Delaware, neither his name nor his enthusiasm can be confined to any one locality, and the character of his patriotism can be splendidly shown by the fact, that when, during the singing of the Star Spangled Banner by the Glee Club in their concert at Wilmington, the Stars and Stripes were brought upon the stage, quick as a flash Chief Justice Lore rose to his feet, and in a moment had the large audience cheering for the Red, White and Blue. All honor to this loyal son of Dickinson, who graduated half a century ago.

* * *

Julian C. Walker, '97, attended the reception given to the Orchestra and Glee Club in Wilmington by Chief Justice Lore.

* * *

Wm. H. Deweese, '93, who is States-Attorney for Caroline county, Maryland, is

making rapid strides in his profession. Not long ago one of the students of the school was warmly welcomed at his offices in Denton, Md., and after expressing his great interest in the work of the school, he renewed his subscription for the FORUM for the next two years—a most sensible thing for an alumnus to do.

* * *

Joseph F. Biddle, '97, writes that he expects to attend this year's Commencement.

* * *

The firm of Griswold and Somerville ('97) reports gratifying progress. A recent letter from them says that they "are getting along so nicely that neither of us has yet deserted the firm to go to fight Spain." Somerville expects to attend Commencement.

DICKINSON SOCIETY

At a meeting of the Dickinson Society last Friday evening, May 6th, Frank T. Morrow was unanimously elected president. Speeches were rendered by the newly elected officer and ex-president Miller.

After the business of the society, the lecturer of the evening, Dr. Himes, was introduced by Dr. Trickett. The lecturer had for his subject "Expert Testimony." The speaker dwelt principally upon the importance of having expert testimony in court and gave very striking examples of its use. At the close of the lecture a unanimous vote of thanks was extended him by the society for his highly entertaining lecture, with the invitation to come again.

ALLISON SOCIETY

Dr. Geo. Edward Reed, President of the Law School, delivered his first lecture on the subject of "Forensic Oratory" before the Society on Wednesday evening, May 4th. The Doctor discussed the principles essential to effective speaking and how to cultivate a good voice for public oratory.

He was listened to by a very attentive audience. The lecture will be followed by two more upon the same subject before the term closes.

MOOT COURT.

FRANK HOWARD vs. HENRY LANGHAM.

Post-dated check— When considered a payment — Presentation — Laches—For the court.

Assumpsit.

GEO. W. AUBREY and CHARLES R. WEEKS for the plaintiff.

1. A post-dated check is payable on or at any time after the day of its date.—Matter of Brown, 2 Story, U. S. One day after date is a reasonable time to present it for payment.—Willis & Co. v. Finley, 173 Pa. 28; Loux v. Fox, 171 Pa 68; Bank v. Weil, 141 Pa. 461; Doherty v. Watson, 29 W. N. C. 32; Maule v. Brown, 4 Bing. N. C. 266; Barclay v. Weaver, 19 Pa. 396; Muncy v. Comm., 84 Pa. 464; Newark Bank Co. v. Bank, 63 Pa. 404; Bank v. Broderick, 13 Wend. 133; Wharton on Contracts; Byle on Bills.

2. Until paid, a check is no payment. It is only *prima facie* evidence, and, if dishonored, the creditor may resort to his original claim.—Loux v. Fox. 171 Pa. 68; Nace v. Hartman, 3 Sup. Ct. 203; Hart v. Boller, 15 S. & R. 162; Weakly v. Bell, 9 Watts 280; McIntyre v. Kennedy, 29 Pa. 448; Eby v. Eby, 5 Pa. 440; Taylor v. Wilson, 52 Mass. 44; Small v. Mining Co., 99 Mass. 277; Smith v. Miller, 43 N. Y. 171; Thompson v. Bank, 82 N. Y. 1; People v. Baker, 20 Wend. 602.

CHAS. G. MOYER and J. KIRK BOSLER for the defendant.

1. It is the duty of holders of checks to present the check at bank at least during the day on which they received it. Not having done so, plaintiff is chargeable with negligence, and the consequent loss.—Smith v. Miller, 43 N. Y. 177; Smith v. Miller, 52 N. Y. 549; Bank v. Weil, 141 Pa. 458; Champion v. Gordon, 70 Pa. 474; Bank v. Broderick, 13 Wend. 133; Harker v. Anderson, 21 Wend. 374; Bank v. Leach, 52 N. Y. 350.

2. If a check, received in payment, is not presented within reasonable time, and the drawer is injured by the delay, the check will operate as an absolute payment.—Smith v. Miller, 43 N. Y. 171; Hunter v. Wetsell, 84 N. Y. 549; McIntyre v. Kennedy, 29 Pa. 448; Smith v. Miller. 52 N. Y. 549; Bank v. Weil, 141 Pa. 458. "If the securities are transferred for a debt contracted at the time, the presumption is that they are received in satisfaction of it." —Lord Mansfield, in 1 Burr 452; McIntyre v. Kennedy, 29 Pa. 451.

OPINION OF THE COURT.

Howard, on Feb. 7, 1895, sold to Langham goods for $423, and Langham gave to Howard, at the time, a check, dated Feb.

11, 1895, for the amount, on his banker—the First National Bank, of Philadelphia. Howard, who kept his account in the Merchants' National Bank, of Philadelphia, for some reason did not deposit this check there until Feb. 11th, just before the close of banking hours, at 3 o'clock. On the next day, Feb. 12th, at 2 P. M., the Merchants' National Bank presented the check for payment at the First National Bank, but found that one hour before it had closed its doors, being insolvent. Langham had, when he drew his check, $1,131 on deposit, of which $719 continued on deposit at the time of the closing of the doors. This is an action of assumpsit with two counts; one on the check, and one on the contract of sale.

By the sale, Langham became indebted to Howard in the sum of $423. He did not pay in money, but he tendered a check on his banker. This check might have been received by Howard in satisfaction of the debt arising from the sale, and, had it been thus received, the action on its non-payment by the bank, when presented properly, would have been solely on the check. But, the check of a debtor is presumed, until it is shown to have been received with a different intention, to be received only as conditional payment; *i. e.*, as payment if and when, the check itself is paid. Should the check not be paid, the original debt remains unsatisfied, and the creditor can revert to it, and sue upon it.—Wagner v. Crook, 167 Pa. 259; Kilpatrick v. B. & L. Asso., 119 Pa. 30; Nace v. Hartman, 3 Superior 203. Thus, if a check given to a lessor for rent due is not paid, the lessor may distrain precisely as if the check had not been given.—Loux v. Fox, 171 Pa. 68.

When a check is received by the creditor, however, he tacitly agrees that he will take proper steps to procure payment of it from the depository bank, and that if he shall fail therein, and the fund in the bank should, in consequence, be lost to the debtor, the check shall become payment. After the depositor has given a check, he is bound to permit so much of his deposit to remain as may be necessary to pay the check. This loss of control by him makes diligence in presentment of the check incumbent on the payee, and visits on him the damage that would follow the insolvency of the bank arising after the time for proper presentment had passed, and before such presentment.—Wagner v. Crook, 167 Pa. 259; Kilpatrick v. B. & L. Asso., 119 Pa. 30. On such a loss there could be no recovery, either upon the check—National State Bank v. Weil, 141 Pa. 457; Willis v. Finley, 173 Pa. 28; or upon the original transaction.—Loux v. Fox, 171 Pa. 68.

When the Langham check was presented for payment to the First National Bank, it had, one hour previously, closed its doors. The check was not paid, and Langham lost his deposit of $719, $423 of which was awaiting the check. Did this loss arise from the want of due diligence on the part of Howard? The payee of a check is not obliged to present it to the depository bank on the day on which he receives it, whether there is or is not time during that day to present it.—2 Daniel, Negot. Inst. 618. "The rule to be adopted," said Lord Ellenborough, "must be a rule of convenience; and it seems to me to be convenient and reasonable that checks received in the course of one day should be presented the next."—Rickford v. Ridge, 2 Camp. 537. This is the rule in Pennsylvania.—National State Bank v. Weil, 141 Pa. 457. The payee of a check is not required to present the check in person to the depository bank. He may deposit it with his own bank, and that bank may present it to the bank on which it is drawn. In that case the payee may wait until the day following that on which he receives it, and then deposit the check in his own bank, and this bank may wait until the next day before presenting it for payment. There will be no default until the expiration of that day without presentment.—Willis v. Finley, 173 Pa. 28; Loux v. Fox, 171 Pa. 68.

But the check given by Langham was a post-dated check. Though delivered on Feb. 7th, it was dated Feb. 11th. Such checks are not unusual, and they are not payable until the day of their date.—2 Daniel, Negot. Inst. 607. In other respects they have the qualities of the ordinary check. They are without grace, and they are not to be presented for acceptance before payment.—Champion v. Gordon, 70 Pa. 474. It is contended that the same time after maturity of such a check is to

be allowed for presenting it as is allowed for presenting the ordinary check. The object of the legal rule is to secure as prompt a presentment as is reasonably convenient. To require a bank, or other holder of a check, to present it on the day of its receipt would be to keep it or him "in continual fever," says Lord Ellenborough—Rickford v. Ridge, 2 Camp. 537. For this reason, presentment on the day of receipt is not exacted. In the case of the ordinary check, the time of payableness is identical with that of delivery. The check cannot be presented until it is in the possession of the payee, and a reasonable time is allowed him from the moment of his acquiring such possession. But, when the possession precedes by a day, or days, the time of payment, why should the permissible delay of presentment date from the maturity instead of the delivery? A post-dated check is an implied promise to pay on the date, if the bank does not. A promissory note, payable on a future day, must be presented on the day of its maturity, in order to make the endorser's liability absolute.—1 Daniels. Negot. Inst. 579. We see no reason why Howard, having the check in his hands on Feb. 7th, should not be required to have deposited it with his own bank not later than the 8th, 9th or 10th, so that that bank might have presented it on the 11th.

At the trial we allowed the jury to say whether the check had been presented with reasonable expeditiousness, and the jury, finding that it had been so presented, returned a verdict for the plaintiff. We think the jury in error in its conclusion, and also that we improperly submitted to it what was a question of law. It is for the court to determine what is a reasonable time for the presentment of a check, when the facts are ascertained.—Loux v. Fox, 171 Pa. 68; Rosenthal v. Ehrlicher, 154 Pa. 396; National State Bank v. Weil, 141 Pa. 457; Willis v. Finley, 173 Pa. 28. We should have advised the jury that Howard waited unreasonably long in presenting the check, and, as it was not contested that it would have been paid had it been presented the day before, that the failure to collect it was the result of his procrastination. The verdict must be set aside, and a new trial granted.

IN RE PEPPER & CO.

Partnership creditors—Creditors of individual partner—Assignment for creditors—Auditor's report.

Exceptions to auditor's report.

FREDERICK C. MILLER and J. B. T. CALDWELL for exceptants.

Appleton must first resort to the individual fund.—Sedgwick's Appeal, 70 Pa. 217; McCormick's Appeal, 55 Pa. 252; Houseal & Smith's Appeal, 45 Pa. 484; Black's Appeal, 44 Pa. 503; Heckman *et al.* v. Messinger, 49 Pa. 465.

An assignment of joint property for the creditors of the assignors will inure to the benefit of the joint creditors first.—Trickett on Assignments, p. 94; Houseal's Appeal, *supra;* Baker's Appeal, 21 Pa. 76.

As against creditors, a copartnership cannot assume the individual liabilities of one of its members.—Boodbeck's Appeal, 163 Pa. 171; North Pa. Coal Co.'s Appeal, 45 Pa. 181.

ROBERT B. STUCKER and ADAIR HERMAN for the auditor's report.

There is a presumption of law that, in the absence of evidence, a loan is made upon the credit of the partnership business.—Mifflin v. Smith, 17 S. & R. 165; Hogg v. Orgill, 34 Pa. 349; Haldeman & Grubb v. Bank of Middletown, 28 Pa. 440.

If one party signs and seals an instrument in the firm's name, and the other partner is present, assenting to it, he is as much bound as if he had signed and sealed.—Fichthorne v. Boye, 5 W. 159; Miller v. Gas Works, 176 Pa. 76; Kramer v. Dinsmore, 152 Pa. 264; Foster v. Andrews, 2 P. & W. 160.

The presumption of law is that an auditor's report is correct; and it will not be set aside except for flagrant error.—Burrough's Appeal, 26 Pa. 264; Mengh's Appeal, 7 Harris 222; Landis *et al.* v. Scott, 32 Pa. 499.

STATEMENT OF THE CASE.

William Mustard and John Pepper were partners in the business of making and selling carriages, under the firm name of Pepper & Co. For material bought, they became indebted to Samuel Bacon, $300; to Philip Shepard, $400; and to Wm. Sherman, $500. John Pepper also carried on a planing-mill, and in that business bought material of Augustus Blaine, $200; of Joseph Andrews, $340; and of Adam Avery, $175. He also bought material of David Appleton, $450. In the transaction, however, he professed to act as the firm of Pepper & Co., and the note he gave was signed by him Pepper & Co. in the pres-

ence and with the assent of Mustard. It was the purpose of Mustard simply to become surety for Pepper, and this was the mode adopted. Appleton, however, supposed that he was selling the lumber to Pepper & Co. The firm of Pepper & Co. and Pepper became embarrassed, and assigned their properties to Daniel Keller, in trust for creditors. All other creditors have been satisfied, except those above mentioned, without objection. Of the firm property there remains a balance of $1,050; and of Pepper's individual property a balance of $600. The auditor appointed to distribute has made the following distribution:

From the property of Pepper & Co. he awarded

To David Appleton,.....	$286 36
To Samuel Bacon,.....	190 91
To Philip Shepard,.....	254 55
To William Sherman,.....	318 18
	$1,050 00

From the property of John Pepper he awarded

To A. Blaine,.....	$216 15
To J. Andrews,.....	253 42
To A. Avery,.....	130 43
	$600 00

Bacon, Shepard and Sherman except that Appleton ought not to have been paid out of the firm fund. Appleton excepts that he ought to have been paid out of both firm and individual fund.

OPINION OF THE COURT.

The first question with which we have to deal is, is David Appleton entitled to claim out of the fund raised by the sale of the property of Pepper & Co.?

The members of a firm have a right that its property shall be appropriated to the payment of its debts. They are each liable for such debts, and if the creditor of one could seize any portion of the common property, he would increase the burden and risk on the other partners, with respect to partnership debts. The rule is well established, therefore, that when firm property is assigned for the benefit of creditors, the creditors of the individual partners can take none of the proceeds until all the firm creditors are paid.—Trickett, Assignments, 94; Houseal's Appeal, 45 Pa. 484; Black's Appeal, 44 Pa. 503; Gallagher's Appeal, 114 Pa. 353. Is Appleton a creditor of the firm?

Pepper & Co. was an existing firm, of which Pepper and Mustard were the members. The former bought material, such as could be used in the business of the firm, of Appleton, professing to act, and believed by Appleton to be acting, for the firm. He executed the firm's note for the purchase, with the assent of Mustard. This made Appleton incontestably a creditor of the firm. He gave no credit to Pepper, as an individual. It could not matter that the intention of Pepper and Mustard was that the material should be Pepper's. With such object or intention of the firm, Appleton had no concern, as, indeed, he was entirely ignorant of it.

Pepper would have had no right, as against his non-consenting partner, to issue a firm note in payment of material sold to him as an individual—McNaughton's Appeal, 101 Pa. 550; James v. Vanzandt, 163 Pa. 171; and firm creditors might successfully object to the payment of it out of the joint assets. There are dicta to the effect that the debt of a partner, for which the firm is not legally or morally responsible, could not be assumed, with the consent of all the partners, by the firm, so as to admit the holder of the debt to share with firm creditors in the distribution of its effects—James v. Vanzandt, 163 Pa. 171; Walker v. Marine National Bank, 98 Pa. 574; Siegel v. Chidsey, 28 Pa. 279; although such dicta are inconsistent with the often-avowed principle that the right of creditors to preference with respect to the firm's assets depends on the equities between the partners—Gallagher's Appeal, 114 Pa. 353; Baker's Appeal, 21 Pa. 76; Himmelreich v. Shaffer, 182 Pa. 201; for it is quite plain that if the partners consent to the issue of a firm obligation for the advantage of one of their number, the payment of that obligation out of the joint assets can do them no wrong. In Siegel v. Chidsey, 28 Pa. 279, it had been said by Woodward J., of a firm note issued to a creditor in lieu of one of a partner formerly held by him, "Nor could it be a fraud on partnership creditors, for they have no lien on partnership effects, and whatever equities are available to them must be worked out through the partners."

However this may be, Pepper had a right to contract for his firm. He professed to contract for it. He issued the firm note. His partner assented. Appleton, therefore, was a creditor. He is not concerned with any arrangements made by the partners *inter se*. If they chose to permit one of their number to appropriate the material sold to them, such appropriation could not impair his right of payment.

The second question raised by the exceptions to the auditor's report concerns the right of Appleton to share in the proceeds of the individual estate of John Pepper. The correlative of the rule that firm creditors must be first paid out of firm assets is the rule that creditors of the individual partners must be first paid out of their individual assets. Appleton can receive anything from the property of John Pepper only if he is the creditor of Pepper. A man may be both the creditor of an individual and of the firm of which he is a member.—17 Am. & Eng. Encyc. 1201; 2 Collyer, Part., 1451. Appleton's sale might have been to Pepper, Pepper & Co. becoming collateral security, simultaneously with the sale, or subsequently. In such a case, a claim could have been made on both the partnership and the individual assets. But, the sale was to the firm. The security taken was the firm's note. No several liability of Pepper was procured by Appleton. He had no right, therefore, to receive anything from Pepper's individual estate, because it was insufficient to pay his creditors.

We see no error in the findings of the auditor. The exceptions to his report are dismissed, and the report is confirmed. Distribution will be made in accordance therewith.

CHARLES SMITH vs. ARUNDEL COFFEY.

Rule in Shelley's Case— Will—Codicil—Intention of testator.

Bill in Equity.

J. HARVEY LINE and THOMAS B. PEPPER for the plaintiffs.

The intention of the testator is the primary and fundamental guide in the interpretation of a will.—Tiedman on R. P., 902 & 903; Malcolm v. Malcolm, 3 Cush. 472; Bowers v. Porter, 4 Pick. 188; Wright's Appeal, 89 Pa. 67; Baker and Wheeler's Appeal, 115 Pa. 590. The word "heirs" may be construed to be a word of purchase rather than one of limitation, if it was the intention of the testator to use it in that sense.—Tiedman on R. P. p. 903; Guthrie's Appeal, 37 Pa. 9; Chew's Appeal, 37 Pa. 23.

The testator may restrain the generality of the former devise and convert what would otherwise be a fee simple into an inferior estate.—Haldeman v. Haldeman, 40 Pa. 29; Shalters v. Ladd, 141 Pa. 349.

RUEL U. CAPWELL and MARTIN F. HERR for defendants.

The rule in Shelley's Case applies here. Guthrie's Appeal, 37 Pa. 9; Kepple's Appeal, 53 Pa. 211; Sheeley v. Niedhammer; 182 Pa. 163; Yarnall's Appeal, 70 Pa. 335; Potts v. Kline, 174 Pa. 513; Potts' Appeal, 30 Pa. 170; Potts v. Griesemer, 174 Pa. 516; Dove v. Torr, 128 Mass. 38; Haldeman v. Haldeman, 40 Pa. 29.

The words "lawful heirs" and "heirs" are presumed by law to be used in their legal sense.—Guthrie's Appeal, 37 Pa. 9; Cockin's Appeal, 111 Pa. 26; Criswell's Appeal, 41 Pa. 238.

A devise to one for life with remainder to his heirs and legal representatives is a fee simple.—McKee v. McKinley, 33 Pa. 92; Steiner v. Kalb, 57 Pa. 123; Nice's App. 50 Pa. 143.

OPINION OF THE COURT.

Jacob Smith made a will in which he devised to "my seven children, four of which are sons, * * * all of my real estate to be divided in eleven shares equal in value. To my son John Smith and to his lawful heirs I will and bequeath two shares." He subsequently acquired other real estate, and made a codicil, in which he says, "I hereby give and bequeath unto my children hereinbefore named all the real estate that I am now seized of as well as all other real estate that I may hereafter purchase or become seized of at my decease. And it is also my desire and intention in this my last will and testament, not to invest the fee simple of my real estate in any said sons or daughters, my said several sons, to wit John * * * cannot dispose of or alienate as well as my daughters any part or parcel of real estate, all of which is to descend to their respective heirs and legal representatives."

John Smith having conveyed one of the tracts thus devised to him to Arundel Coffey, his heirs and assigns, has since died, and his son Charles Smith brings this ejectment against Coffey.

The theory on which the plaintiff brings this action is, that under the will of his grandfather, his father acquired but a life estate. The original devise was to "John Smith and to his heirs." Had these words not been qualified by the codicil, John Smith would certainly have obtained a fee, and his son could not maintain this action against his grantee. Has the codicil changed the nature of the estate conferred on John Smith?

The testator's intention seems quite clear. It was his "desire and intention" not to invest the fee simple of his land in John or any other child. He expressly denies to them the power to alienate any part of the land, and he directs that all of it shall descend to their respective heirs. Generally, the courts endeavor to carry out the intention of the testator. When the statute of wills authorized testamentary dispositions of land, its object was to permit the decedent to regulate the transmission of it. This concession having been made to him, the primary aim of the courts became that of interpretation. But difficulties soon presented themselves. Many wills were of doubtful signification. Of two or more intentions of the testator, some were found to be incompatible with each other. Arrangements of estates were devised which a sound public policy condemns. Various rules were from time to time evolved which do not seek to ascertain, but to check and override the testamentary purpose. The rule against perpetuities is one of these. The rule in Shelley's Case is another.

The object of the rule in Shelley's Case is not to learn what the will of the testator was, but to determine what should result when his will in certain respects was ascertained. The "common result of the application of the rule in Shelley's Case," says Williams J., is to defeat the intention of the testator.—Sheely v. Neidhammer, 182 Pa. 163; Auman v. Auman, 21 Pa. 343 (a deed); Grimes v. Shirk, 169 Pa. 74. When the testator intends (1) to give a life estate only to A, and (2) the remainder in fee to any person whatever who shall at his death be the heir of his body, or his heir, that rule refuses to execute the second intention and enlarges the estate that would otherwise vest in A into a fee tail or a fee simple. Do then the conditions exist upon which the rule in Shelley's Case operates?

The testator has in the will given the land to John and his heirs. In the codicil, he says his intention is not that he shall have a fee simple, but an estate which he cannot aliene, and which will descend to his heirs. In short, he intends John to have a life estate and no more, and he intends the remainder to descend on John's heirs. How are we to understand the word "heirs"? It is a technical word, and is almost invariably employed and interpreted in that sense. It is presumed to have that sense unless some other is unequivocally indicated in the will.—Guthrie's Appeal, 37 Pa. 9; Sheely v. Neidhammer, 182 Pa. 163; Cockin's Appeal, 111 Pa. 26; Criswell's Appeal, 41 Pa. 288. Nothing appears in Smith's will to influence the interpretation of this word. He did not mean the children of John. He meant the heirs of John. If John left surviving him children, they *would* be his heirs. But if he left of lineal relatives only grandchildren or great-grandchildren, these would be his heirs. If he left no lineal relatives, but brothers or sisters, or nephews or nieces, these would be his heirs. He intended that the remainder, after John's death, should pass to whoever should be his heir. The contemplated remaindermen were therefore not the root of a new succession. They were themselves branches from the root John.—Guthrie's Appeal, 37 Pa. 9.

Were this not already clear, it would become so by means of the word "descend." The testator directs that the land is "to descend to their [his children's] respective heirs and legal representatives." The word descend denotes the vesting of an estate by operation of law in the heirs. Potts v. Kline, 174 Pa. 513; Haldeman v. Haldeman, 40 Pa. 29. Land passes to an heir, *qua* heir, by descent. To any one else, it passes by purchase. It is beyond all question, we think, that Jacob Smith intended precisely such persons as would be John's heirs to take the land devised to him at his death.

The direction that John "cannot dispose of or alienate" the land is perhaps an indication that the testator intended him to take but a life estate. That intention is quite manifest, independently of such provision. We have already seen that it is not the object of the rule in Shelley's Case to find out and execute the whole will of

the testator, but having found out that he intends to give a life estate to A, and a remainder to the heirs of A, to withdraw all interest from the heirs, and to bestow it on A. If the object was to give John a fee, but to deprive him of the power to sell the land, this again is an object which the law will frustrate. Such clogs on alienation are not tolerated.—Kepple's Appeal, 53 Pa. 211; Sheely v. Neidhammer, 182 Pa. 163; McIntyre v. McIntyre, 123 Pa. 329.

John Smith therefore acquired a fee simple under his father's will. This fee passed by his deed to Arundel Coffey, and when he died, there was no estate in him to descend upon the plaintiff, Charles Smith. On the case stated therefore, judgment will be entered for the defendant.

JOHN JONES vs. WM. THOMPSON.

Replevin—Sale of personal property to one judgment creditor—Execution on same property by the other judgment creditor.

Replevin. Motion for new trial.

CLEON N. BERNTHEISEL and GEO. W. BETSON in support of the motion.

CHAS. E. DANIELS and J. AUSTIN SULLIVAN *contra.*

There was sufficient change of possession to constitute a good delivery as against the rights of other creditors.—Ayers v McCandless, 147 Pa. 149; Zeigler & Co. v. Hendrick, 106 Pa. 82; Chase v. Ralston *et al.*, 30 Pa. 531; Williams & Co. v. Rolling Mill Co., 174 Pa. 299; Cessna v. Minick *et al.*, 113 Pa. 70; Garretson v. Hackenberg, 144 Pa. 107; McKibbin v. Martin, 64 Pa. 352; Long v. Knapp, 54 Pa. 514.

The purchase was in good faith, and for a valuable consideration; it was followed by acts intended to transfer possession and title, and the vendee assumed such control as indicated ownership. Therefore, the delivery, as matter of law, was sufficient. —Cases cited above.

Replevin may be maintained by proving either a general or special property in the plaintiff, together with his right of immediate possession.—R. R. Co. v. Ellsey, 85 Pa. 283; Strong, Deemer & Co. v. Dinning, 175 Pa. 586.

STATEMENT OF THE CASE.

Paul Robinson owned a piece of timber land. He cut the timber into saw logs, and let it lie in the manner in which it was cut. John Jones and Wm. Thompson were judgment creditors of Robinson. On September 1, 1897, at 1 o'clock P. M., Robinson went with Jones upon the land and sold the logs to Jones. Robinson counted and marked the end of every log with a stroke of lead pencil. After the logs were counted, Robinson signed a bill of sale, transferring the logs to Jones, and Jones gave a receipt for the price of the logs as credit on the judgment held by him against Robinson. The bargain took place upon the land, in view of the logs. It was consummated, and they left before 5 o'clock P. M. same day. At 5 o'clock P. M. same day Thompson issued an execution under his judgment against Robinson, and the sheriff levied upon the same logs as the property of Robinson. At the sale Thompson bought them, and took possession. Jones brought replevin for the logs. On the trial the judge instructed the jury that if they found the facts as stated above, and that all practicable change of possession had taken place when the Thompson execution issued, Jones had title to the logs under the purchase from Robinson. Verdict for Jones. Thompson asks for a new trial, for the reason that the above instruction to the jury was error.

OPINION OF THE COURT.

The logs were at one time the property of Paul Robinson. The parties to this action respectively claim them, the plaintiff in virtue of a private sale, and the defendant in virtue of an execution sale. The private sale preceded the execution sale. What is there to invalidate it, as respects the latter?

John Jones was a judgment creditor of Robinson. The consideration of the sale to him was his satisfaction, to the extent of the price, of this judgment. As between them, the judgment is conclusive that the debt, represented by it, existed. Such sale therefore passed the ownership of Robinson over to Jones.

But, while a sale may be good between the immediate parties to it, it may be void as to others. The person who contests the sale to Jones is William Thompson, an execution creditor and a purchaser. Is the sale to Jones voidable by Thompson?

It was for a substantial consideration; and is not therefore voidable because gratuitous. The credit on the judgment is a sufficient price for the logs. A debtor may transfer his chattels to his creditor, effectively as against other creditors, if the price

at which they are transferred is fair, and there is no *mala fides*.—Garretson v. Hackenberg, 144 Pa. 107; Zeigler v. Handrick, 106 Pa. 87; Williams v. Rolling Mill Co., 174 Pa. 299.

Even though this consideration was adequate, if the sale was made in order to defraud or delay Thompson, it would be voidable by him. But there was no such purpose. Its object was to pay Jones. It is too well known that one of several creditors can accept payment from the debtor without risking the attachment or seizure of the money or chattels received by him by other creditors, to need citation of authority. Preference of one creditor over another by the debtor is one of the most constantly recurring phenomena of business transactions. To prohibit it would be indeed to work a profound and far-reaching revolution.

But, besides the absence of any oblique motive towards other creditors, the law in many cases requires a delivery of the possession of the thing sold to the vendee. Without such delivery the sale, as respects the parties, may be effectual. The ownership may pass, if they intend, from the seller to the buyer.—Hetrick v. Campbell, 14 Pa. 263; Boyle v. Rankin, 22 Pa. 168; Janney v. Howard, 150 Pa. 339; Croft v. Jennings, 173 Pa. 216. But, in order to apprise creditors of the vendor, or subsequent purchasers of the same chattel from him, that he has ceased to be its owner, it is usually necessary that it should pass from his possession to the purchaser. Although the parties intended no fraud upon others in the sale, the omission to change the possession, because of its tendency to deceive later purchasers or creditors, has the effect of fraud—Stephens v. Gifford, 137 Pa. 219; McClure v. Forney, 107 Pa. 414; Janney v. Howard, 150 Pa. 339; except as to such later purchasers as were aware of the earlier sale—Croft v. Jennings, 173 Pa. 216.

It is alleged by Thompson that the sale to Jones not being accompanied by a change of the possession, was in this sense fraudulent as to him, and void. In determining what change of possession is necessary, regard must be had to the relations of the parties, the nature, use and situation of the property.—Goddard v. Weil, 165 Pa. 419; Renninger v. Spatz, 128 Pa. 524. There may be an effective change of possession without a change of the situation of the chattel.—Garretson v. Hackenberg, 144 Pa. 107; Pressel v. Bice, 142 Pa. 263; McClure v. Forney, 107 Pa. 414; Ayers v. McCandless, 147 Pa. 49; Cessna v. Minick, 113 Pa. 70. The logs were distinguished and marked. Then a bill of sale of them was executed. A receipt for a payment on the judgment was given to Robinson. It is quite clear that there was here all the delivery necessary to identify the logs and to pass the ownership of them to Jones. There was no other change of possession. The logs continued to be where they had been. They were not on the land of Jones, as they were in Garretson v. Hackenberg, 144 Pa. 107, but on that of Robinson. They were not even marked with the name of Jones, or with any mark that could apprise others that they were his, as in Ayers v. McCandless, 147 Pa. 49.

But a very short interval of time lay between the completion of the sale and the issue of the *fi. fa.* The parties repaired to the land where the logs were, at 1 P. M. Precisely when the negotiation was completed does not appear. They left before 5 o'clock. At 5 o'clock the execution was issued. It is evident that a very short time intervened, a time too short for the removal of the heavy timber which was the subject of the sale. Such change of possession as is reasonably practicable is all that is required.—McClure v. Forney, 107 Pa. 414. It would be unreasonable to say that fifteen minutes after a sale of a heavy and bulky article, it can be avoided by a *fi. fa.* because within that time the article has not been hauled away, or because conspicuous symbol of a transfer has not been displayed. We think that the evidence was sufficient to justify the jury in inferring that all the change of possession of which the property was susceptible in the time that elapsed before the issue of the *fi. fa.* had taken place. As they did so infer, it followed that the logs had become the property of Jones when the Thompson writ came to the hands of the sheriff. There was no misdirection for which a new trial should be awarded.

RICHARD HASTINGS vs. JOSIAH PROCTOR.

Impairment of the mind of a grantor—Opinion of a non-expert—Where part of an offer is incompetent, court may reject the whole.

Bill in equity.

FRANCIS LAFFERTY and PAUL J. SCHMIDT for the plaintiff.

1. A non-expert may testify to facts within her knowledge regarding the mental condition of a grantor. Also, after stating such facts, may give her opinion based thereon.—Bank v. Wierback, 106 Pa. 37; Dickinson v. Dickinson, 61 Pa. 401; Barker v. Comins, 110 Mass. 477; McKee v. Nelson, 4 Cowen 355; Ins. Co. v. Rodel, 95 U. S. 239; Pidcock v. Potter, 68 Pa. 342; Wilkinson v. Pearson, 23 Pa. 117.

2. Opinion of a duly qualified expert is always admissible.—Kershaw v. Wright, 115 Mass. 361.

GABRIEL H. MOYER and SYLVESTER B. SADLER for the defendant.

1. The opinions of non-experts as to capacity are inadmissible, until they have stated facts from which the weight of their opinion may be determined.—Elcessor v. Elcessor, 146 Pa. 359; Doran v. McConlogue, 150 Pa. 98; Burnham v. Sherwood, 14 Atlan. 715; Bank v. Wierback, 12 W. N. C. 150; Stokes v. Miller, 10 W. N. C. 241; Clark v. Clark, 168 Mass. 523.

2. Evidence should be confined to incapacity at time of execution.—Cummins v. Hurlbutt, 92 Pa. 165; Stevens v. Vancleve, 4 Wash. C. C. 268; Stine v. Sherk, 1 W. & S., 195; Irwin v. Shoemaker, 8 W. & S. 75; Wilkinson v. Pearson, 23 Pa. 119.

3. The testimony as to the recent mental state of the plaintiff by alienists and physicians is incompetent and irrelevant, and one portion of the offer being incompetent, the court is not bound to separate the good from the bad, and the whole should be refused.—Keeler Co. v. Schott, 1 Superior Court 458.

STATEMENT OF THE CASE.

On February 3, 1891, Hastings executed a deed to Proctor for a tract of land. He was then 87 years old, his sight imperfect and his mind not very good. Proctor had been a son-in-law, having married thirty years before a daughter of Hastings, who had been dead for ten years. Intimate relations between Hastings and Proctor had subsisted since the marriage of the latter, and in late years the latter had at Hastings' request attended to the more important pieces of business of the former. The present bill was filed by Hastings to compel Proctor to deliver back the deed to Hastings and to declare it void. Hastings alleges that he was told he was signing a contract of lease which he was about entering into with one Jones, for a certain mill property and that he had never talked with Proctor about a conveyance of the land covered by the deed of February 3, 1891 and that Proctor's act was entirely fraudulent. A sister of Hastings was tendered as a witness at the trial in 1897 to testify that she had been in constant communication with him since his childhood; that his mind had shown serious impairment in the last ten years; that this impairment was manifest in various acts and peculiarities which she would describe; and that it was now in the same condition as in 1891. Counsel stating that he would follow the witness with other expert alienists and physicians who had observed Hastings recently and would describe his recent mental state.

OPINION OF THE COURT.

The bill filed by Hastings does not allege insanity at the time of making the conveyance to Proctor. The facts that impair that conveyance are stated in it to be the misrepresentation by Proctor of the character of the instrument presented by him to Hastings for execution, and the abuse by the former of the confidence of the latter. The reliance on Proctor's information as to the nature of the instrument is explained by the comparative blindness of Hastings. The attempt to show mental impairment of the latter is in order to explain how he could have been imposed on by Proctor.

The witness is offered to show that she has been in constant communication with him since childhood, that for the last ten years his mind has been seriously impaired and that this impairment has manifested itself in various acts and peculiarities, which she will describe.

Serious impairment means either (1) a serious reduction of mental power from Hastings' former standard or (2) a reduction of it below the normal or ordinary standard. May the witness testify to it in the former sense? The answer to this is the answer to two other questions. Can the witness form an opinion as to the mental state at each of two points of time, and can he compare these states and pronounce of the later that it is inferior to the former?

A, who is in contact with X, learns the qualities of his mind as readily as of his features. He knows whether X is quick or slow of apprehension, has a good or a bad memory, is patient or not, irascible or not, affectionate or not, confiding or suspicious, of good or bad reasoning power. A knows how X compares in these respects with Y. If he continues in relation with X through the various stages of his life, he may know how in one stage the mental faculties compare with what they were in another stage. There can be no doubt that the sister is competent to consider the present mental power of Hastings in conjunction with his past power, and to say that he has suffered a serious impairment of it.—Commonwealth v. Brayman, 136 Mass. 438; Clark v. Clark. 168 Mass. 523.

But, the design of the testimony proposed seems to be to show that the mental power of Hastings is seriously below the ordinary or normal, that if he is not insane, he is intellectually feeble in comparison with the average man. Is the witness competent to give such evidence? She is not an alienist nor an expert of any kind. A non-expert witness is not permitted to say that a person is insane unless he has observed and described certain facts which are so characteristic of insanity that they tend to prove it.—First National Bank v. Wirebach, 106 Pa. 37; Dickinson v. Dickinson, 61 Pa. 401; Stokes v. Miller, 10 W. N. C. 241; Dean v. Fuller, 40 Pa. 478; Titlow v. Titlow, 54 Pa. 216; Pidcock v. Potter, 68 Pa. 342. The witness on the stand offers to state acts and peculiarities of Hastings. They may be of such a nature as to warrant the inference of imbecility or mental feebleness. If they are, it will not be error to allow her to state that his mind has "shown serious impairment." Irish v. Smith, 8 S. & R. 573. A witness may say of a person that from his appearance he believes him to be of sound mind, Wilkinson v. Pearson, 23 Pa. 117; or, after describing (though very vaguely) the appearance, that he believes him to be "childish."—8 S. & R. 573.

The deed to Proctor was executed on February 3, 1891. Hastings' mental condition at any other time is irrelevant, except in so far as it tends to disclose the condition on that day.—First Nat. Bank v. Wirebach, 106 Pa. 37. Weakness of mind a short time before February 3, 1891, *e. g.*, a day before, would justify the inference that it continued on that day.—First Nat. Bank v. Wirebach, 12 W. N. C. 150. Is it proposed to show the state of the grantor's mind before Feb. 3, 1891? The witness is to state, according to the offer, that there has been serious impairment in the last ten years. Seven of those years have succeeded that date. Impairment during these seven would be impairment "in the last ten years." But did any of the acts and peculiarities to which the witness is to testify occur before February 3, 1891? It does not so appear. As the opinion concerning the mental state is admissible only if facts are stated which reasonably suggest insanity, imbecility or mental weakness, it is incumbent on the proponent to show clearly that the acts to be proven preceded the execution of the deed to Proctor. Otherwise no opinion of the witness as to the grantor's state before and at that time will be admissible.

The offer proposes also to show the grantor's condition down to the time of trial in March, 1898; that is for the period of seven years after the execution of the deed. In what light is this relevant? An insanity shortly after an occurrence may be of such a nature as to indicate that it had not come suddenly and recently, and if that is so, the inference might properly be drawn that it had existed at the time of the occurrence. In Wilkinson v. Pearson, 23 Pa. 117, it was intimated that an insanity two years after the event would be too late unless there was evidence of insanity at intervening periods.—*Cf.* White v. Graves, 107 Mass. 325. Proof that Hastings is now, seven years after the making of the deed, imbecile, can scarcely be evidence of his imbecility then.

But, the evident object of the plaintiff is to prove the continuance of the same type or degree of mental feebleness from Feb. 3, 1891, to the present, in order to make available the opinion of experts as to the existence of imbecility. If an adequate description of the conduct, words, manner, appearance, etc. of Hastings in February, 1891, were given, alienists might express an opinion on his sanity or insanity, on the hypothesis of the truth of this description. 7 Am. & Eng. Encyc. 503; First National Bank v. Wirebach, 106 Pa. 37. Instead

of considering such a description, the physicians examine Hastings themselves and form an opinion of his feebleness. The sister proves that the same condition existed in 1891 as now; that there was then a similar appearance, similar conduct, similar words. We think she is competent to affirm the similarity of mental and moral conduct in 1891 and in 1898, and that the jury might legitimately apply to the conduct of 1891, the judgment of the experts as to that of 1898.

As some of the evidence offered is not admissible, we shall reject the offer.—Keeler Co. v. Schott, I Superior 458.

SARAH GRIGGS vs. PASSENGER RAILWAY CO.

Passenger Railways—Negligence.

Trespass.

DANIEL R. REESE and MARLIN WOLF for the plaintiff.

The conductor was negligent in allowing passengers to ring the bell for starting and stopping the car.—Pittsb. & Connelsville R. R. Co. v. Pillow, 76 Pa. 510; Pa. R. R. Co. v. Kilgore, 32 Pa. 292; Broadway & Seventh Avenue Railway Co. v. Putnam, 55 N. Y. 108; Mulhado v. Brooklyn City Ry. Co., 30 N. Y. 370; Spohn v. Missouri Pacific R. R. Co., 87 Mo. 74.

By reason of plaintiff's age and condition, extra care should have been exerted in her behalf on part of defendant.—Cleveland R. R. Co. v. Missouri, 30 Ohio 451; Hale on Carriers, p. 522.

The negligence of the conductor is imputable to the company.—Hale on Carriers, 523-4-5; Penna. Co. v. Roy, 102 U. S. 451; Fed. St. & Pleasant Valley R. R. Co. v. Gibson, 96 Pa. 83.

FRANK J. LAUBENSTEIN and WM. M. FLANIGAN for the defendant.

The defendants were not negligent.—Ellinger v. Phila., Wilmington and Baltimore R. R. Co., 153 Pa. 213; Fredericks v. Northern Central R. R. Co., 157 Pa. 103; Ferry v. The M. R. Co., 118 N. Y. 497; Pecard v. The Ridge Ave. R. Co., 147 Pa. 195; P. & R. R. R. Co. v. Heil, 5 W. N. C. 91; Farley v. Phila. Traction Co., 132 Pa. 58; Hinck v. Pittsb., Ft. Wayne and Chicago R. R. Co., 53 Pa. 512.

A railway company is not responsible for the acts of passengers.—Ferry v. Manhattan Ry. Co., 118 N. Y. 497; Harrison v. Miss. Ry. Co., 66 Miss. 419; Curtis v. R. & S. R. R. Co., 18 N. Y. 534.

STATEMENT OF THE CASE.

On May 17, 1895, Sarah Griggs, 72 years of age, and weighing 180 pounds, was riding in a car of defendant, in the borough of Carlisle. In this car, which was but 20 feet long, there were 50 passengers, some of them standing on the rear platform. At A street the car always stopped so that ringing the bell was omitted by the conductor. While he was collecting fares in the car, as it was approaching A street, a passenger on the rear platform rang it without authority. Mrs. Griggs had told the conductor that she wanted to alight there. When the car stopped, he called out A street, and nodded to her to indicate that she should get out. Other passengers rushed out in front of her so that she was the last to get out. When she was stepping from the step to the ground, the same passenger rang the bell without authority, and the car suddenly started, and Mrs. Griggs was thrown to the ground, although the conductor, who had returned to the platform, was about extending his hand to assist her. Although passengers sometimes rang the bell, it did not happen more than 3 or 4 times a week on this car, although it happened rather frequently on other cars of the defendant. Such act was regarded as officious by this conductor.

CHARGE OF THE COURT.

We are requested, gentlemen of the jury, to instruct you that there is not sufficient evidence of the defendants' negligence.

The Railway Company is not liable simply because there was an accident. It does not insure the safety of its passengers. It is bound simply to exercise extreme care, and is responsible only for such injuries to passengers as result from the absence of such care. It is its duty to furnish them opportunities for a safe exit from its cars. If it starts too soon, and thus causes injury to them, it becomes liable.—Passenger Railway Co. v. Stutler, 54 Pa. 375; Pa. R. R. Co. v. Peters, 116 Pa. 206. The evidence amply justifies a conclusion that not a sufficient time was accorded Mrs. Griggs to descend from the car. She was old and far from agile. The car ought to have been halted long enough to allow her to safely land upon the ground. The car was started nevertheless while she was still in the act of descending. We think it would indisputably be for you to say whether the conductor was negligent if the agency of the passenger had not intervened.—Mulhado

v. Brooklyn City R. R., 30 N. Y. 370; Washington and Georgetown R. R. Co. v. Harmon, 147 U. S. 577. The start of the car was due primarily to the ringing of the signal by a passenger. He rang it without authority. His act cannot be attributed to the company. If it was in no indirect way responsible for the ringing and the consequence, its exoneration would be inevitable. In Ellinger v. P. W. & B. R. R., 153 Pa. 213, the rude and impatient movement of a passenger boarding a car, caused a descending passenger to fall. The company neither caused the act nor could have prevented it, or intercepted its consequences. It was for that reason not actionable.

When, however, the company could with care have prevented the improper conduct of passengers, or could have, with reasonable diligence, averted its results, it has been held responsible for these results. Thus, it is negligence to omit proper measures to suppress a fight in a car, Pittsburg, etc. Railway v. Pillow, 76 Pa. 510; *Cf.* Pittsburg, etc. R. R. v. Hinds, 53 Pa. 512; Duggan v. Baltimore and O. R. R., 159 Pa. 248; Putnam v. Broadway, etc. Railway Co., 55 N. Y. 108. To have refrained from doing what might reasonably have been done to prevent a passenger's ringing the signal to start, or from countermanding it in some way might be negligence.—Nichols v. Lynn & Boston Railroad, 168 Mass. 528.

Might the conductor, exercising proper care, have prevented the ringing of the bell? The same passenger had just rung the bell as a signal to stop. Should the conductor have requested him not to repeat the act? Three or four times a week, the bell of this car was rung by passengers. Was this done with the sufferance of the conductor? Might the failure to rebuke and forbid such acts have led to the particular act which caused the injury to the plaintiff? It appears that the ringing of the bell on other cars of the defendant happened "rather frequently." We think in these circumstances there is enough to support a finding that the company's previous neglect to check the habit of ringing the bell led to the accident to Mrs. Griggs.—Nichols v. Lynn & Boston Railroad, 168 Mass. 528.

The conductor was at the rear of the car when the plaintiff was attempting to descend from it. Could he have countermanded the signal to start? Was he careless in not doing so? Did he exercise reasonable diligence and care in attempting to avert from the plaintiff any injury from the start which the signal led him to expect? These questions can be answered only by the jury, and on your answer to them will depend the character of the verdict that you will render. We must decline therefore to affirm the point of the defendant.

JOHN DENNISTON vs. JULIA THOMPSON.

Conversion—Wife's chattels as collateral security for husband's debt—Transfer of wife's chattels to surety of husband—Act 1893.

Trespass for conversion.

MILES H. MURR and W. LLOYD SNYDER for the plaintiff.

1. A very slight advantage to one party, and a trifling inconvenience to the other, is a sufficient consideration to support a contract, when made by one of good capacity, and not under the influence of fraud, imposition or mistake.—Harlan v. Harlan, 20 Pa. 303; Kuhn v. Ogilvie, 178 Pa. 303; Forster v. Fuller, 6 Mass. 58; Hubbard v. Coleridge, 1 Neb. 84; Hind v. Holdship, 2 Watts 104; Crombine v. McGrath, 139 Mass. 550.

2. Notwithstanding the act of 1893, P. L. 344, a married woman may mortgage her estate as security for her husband's debts.—DuBois Bank v. Kuntz, 175 Pa. 432; Kuhn v. Ogilvie, 178 Pa. 303; Hoffey v. Caisey, 73 Pa 431; Kulp v. Braub, 162 Pa. 222; Brown's Appeal, 94 Pa. 362; Dandas' Appeal, 94 Pa. 76; Hagenback v. Phillips, 112 Pa. 248; Black v. Galway, 24 Pa. 18.

3. If plaintiff is entitled to possession, he may recover.—Hardy v. Reed, 60 Mass. 253; Morgan v. Ide, 8 Cush. 450.

FRANK H. STROUSS and JACKSON ORLANDO HAAS for the defendant.

1. The plaintiff has no title. There was no consideration to enforce the contract.—Cobb v. Page, 17 Pa. 469; Dunbar v. Flusher, 137 Pa. 85; Clark v. Russell, 3 Watts 213. Allowing the defendant to retain possession is no consideration.—Fink v. Smith, 170 Pa. 124; L'Amoreaux v. Gould, 7 N. Y. 349; White v. Heyman, 34 Pa. 142; Crashy v. Wood, 6 N. Y. 370.

2. Statutes of Frauds requires a writing.—1 P. & L. Dig. Pa. 2194.

3. Contract is prohibited by act of June 8, 1893. A married woman cannot become surety for her husband.—2 P. & L. Dig. Pa. 2890; Kuhn v. Ogilvie, 178 Pa. 203;

Lutchens v. Paris, 19 Phila. 374; Bunting's Estate, 5 C. C. 623.

4. There is no valid gift for want of delivery.—Scott v. Lauman, 104 Pa. 593; Kidder v. Kidder, 33 Pa. 268; Zimmerman v. Strelper, 75 Pa. 147.

5. Plaintiff must have right to immediate possession to recover.—Moorehead v. Scofield, 111 Pa. 584; Duffield v. Miller, 92 Pa. 286; Newhall v. Kingsbury, 131 Mass. 445.

STATEMENT OF THE CASE.

Charles Thompson, husband of Julia, was indebted to several persons on notes, on which Denniston was surety, and also to his wife for $1,000. He assigned personal property, horses, wagons, agricultural implements, worth $1,000, to his wife in satisfaction of the debt owed to her. She thereupon made a contract with Denniston, in which she transferred these goods to him as security against his liability on the Charles Thompson notes. He allowed her to retain the goods, however, in order to carry on the farming. Subsequently she advertised a public sale of these goods. Denniston, attending the sale, gave notice that the goods were his. The sale, nevertheless, proceeded, and the goods were bought by sundry persons. Denniston then brought this action of trover against Julia Thompson.

OPINION OF THE COURT.

The personal property, formerly of Chas. Thompson, became, by his assignment to her, the property of his wife. She then transferred it to Denniston, not in gift, not in sale, but as a collateral security. As the chattels continued in her possession, such a transfer would not have been valid as against execution creditors of or purchasers from her, who were not aware of the transfer. It would not be invalid because of this retention of possession, as between Denniston and Julia Thompson.—Tiedeman, Sales, 344, 395; Bismark Building Association v. Bolster, 92 Pa. 123.

But, Julia Thompson was a married woman, and she assigned these chattels, not to pay or to secure the payment of her own debt, but to protect Denniston from liability for her husband. Did her coverture make the assignment void? At common law the distinction was taken between a contract by a feme covert to pay and an actual payment; between a contract to transfer money, etc., and an actual transfer thereof. A payment of money, or a transfer of a chose in action, by her, was valid, if made with the consent of husband. She could give chattels to the husband, or, with his consent, to another.—Gutshall v. Goodyear, 107 Pa. 123; Hinny v. Phillips, 50 Pa 382; Mann's Appeal, 50 Pa. 375. She could give a policy of life insurance, with his consent, to another.—Bond v. Bunting, 78 Pa. 210. Having a testamentary charge on land which her husband has acquired, she might give the money represented by it to him by a release.—Powell's Appeal, 98 Pa. 403. [The release was held null here because a gift was not intended.] With her husband's assent, she could transfer shares of stock to a brother, to enable him to obtain a loan upon it as security.—Souder v. Columbia National Bank, 156 Pa. 374; *Cf.* Hinkle v. Landis, 131 Pa. 573; Brown v. Niethammer, 141 Pa. 114; Leiper's Appeal, 108 Pa. 377. Under late legislation the consent of the husband is not necessary. Even at common law, then, the coverture of Mrs. Thompson would not have avoided the transfer of her chattels to Denniston gratuitously, or by way of absolute sale.

At common law the wife could mortgage her land in order to secure the repayment of a debt of her husband or of another; 3 Liens 115; Hagenbach v. Phillips, 112 Pa. 284; Citizens' Saving Asso. v. Heiser, 150 Pa. 514; Kuhn v. Ogilvie, 178 Pa. 303; Du Bois Deposit Bank v. Kuntz, 175 Pa. 432. She could transfer a U. S. bond owned by her, Selden v. Nat. Bank of Meadville, 69 Pa. 424; shares of stock or chattels for the same purpose, Dando's Appeal, 94 Pa. 76.

The second section of the act of June 8, 1893, 2 P. & L. 2890, after declaring that a married woman may "make any contract in writing or otherwise" etc., adds, "but she may not become accommodation indorser, maker, guarantor or surety for another." If transferring property, real or personal, to secure the debt of another, is becoming surety, then this clause prohibits mortgages, whether of land or chattels, by a married woman, for that object, and in Kuhn v. Ogilvie, 178 Pa., 303, it is said by Mitchell J. that it might well have been held that a mortgage by a married woman to secure her husband's debt is in substance a contract of suretyship, which she was

not, at common law, capable of making." In Weigle v. Mercer, 1 Superior 490, where a married woman transferred to a surety of her husband, to protect him from liability, a judgment owned by her, on which an execution was issued, and it was agreed that the surety should buy in the goods of the defendant and hold them "solely as collateral security," it was held by the court that it should not lend its aid to the surety to regain the possession of the goods which the assignor, the wife, had in her hands, because of the clause of the act of 1893 *supra*. Nevertheless, the right of every owner to convey his or her estate is held to include the right to convey land, 178 Pa. 303, or a chose in action, Kulp v. Brant, 162 Pa. 222, by way of mortgage for any purposes, and *inter alia*, for the purpose of securing the husband's debt. To make herself personally liable for another's debt would be for the wife to become surety. She does not become surety when she makes some specific property liable for such debt.

But in all the cases that we have examined in which the wife's mortgage of chattels or land has been recognized as binding, there has been a consideration for it. The debt has been created simultaneously with the mortgage, or the mortgage has postponed the period of its payment. Denniston was already a surety when he received the transfer from Mrs. Thompson, and he in no way increased his burdens in accepting it. He in no sense has furnished any consideration for the transfer. Does this prevent his asserting a right to the chattels? In White's Appeal, 36 Pa. 134, a wife assigned her interest in her father's estate to one, already a creditor of her husband, who gave no consideration for the assignment. The wife subsequently repossessed herself of the assignment without his consent. The orphans' court, in distributing the father's estate, declined to award any of it to the creditor because there was not "any act or consideration to constitute an equity." In Weigle v. Mercer, *supra*, although one of the grounds for refusing to compel the wife to permit her assignee to take the chattels that he had purchased at the sheriff's sale by means of the judgment assigned to him, was that the contract was one of suretyship—a position which is untenable—another ground was that the assignee was such "through an executory contract without consideration or merit." It is difficult to see why, if a wife can part with her entire title in land or chattel, by way of gift, she may not give so much of it as may be necessary to realize a certain sum of money on a contingency. A gratuitous transfer of a chattel as a collateral security is precisely such a gift. Nor can it be said that the gift to Dennison was only executory. An executory gift is not a gift, but an intention or a promise to give. But, when does the promise to give become a gift? The delivery of a deed for land, with the intention properly expressed in the deed that the ownership shall at once pass is, if gratuitous, an executed gift. The delivery of a paper purporting to be an assignment of a right to receive money on a life insurance policy is an executed gift of the right, although the policy itself is retained by the donor.—Bond v. Bunting, 78 Pa. 210. The gift of the chattels by Mrs. Thompson to Dennison, to be used by the latter as a source of indemnification should he have to pay the notes on which he was surety, was complete. But, so was the gift in White's Appeal, *supra*, and so seems it to have been in Weigle v. Mercer, *supra*.

Denniston "allowed" Mrs. Thompson to retain the goods "in order to carry on the farming." When she sold them, she violated the condition on which she held them. The mere act of sale was a conversion. No demand for the return of them was necessary before instituting the action. The right to retain them was lost by the sale. There would have been then, in the plaintiff, a right to the possession, and a special property, had the assignment to him been valid. A new trial will be granted.

ALVA HAZLITT vs. WM. HARPER.

Partnership debt—Execution against a member—Levy on firm property—Subsequent execution against firm—Sale.

Distribution of fund from sheriff's sale.

A. FRANK JOHN and LLEWELLYN HILDRETH for the plaintiff.

1. Partnership property can be levied upon and sold under an execution against an individual member of the firm, where the execution is for a firm debt, and upon

the distribution of the money paid into court it is competent for a creditor to show that an execution against individuals was for a partnership debt, and that the debtors were members of the same partnership.—Franklin v. Morris, 154 Pa. 152; *In re* McHose Fund, 10 Montg. 47; Boyd v. Thompson & Coxe, 153 Pa. 78; Union Pottery Co. v. Ginder, 2 Lancaster 345; Grier & Co. v. Hood, 25 Pa. 430; Urey v. Bair, 5 York 195; Gerard v. Basse, 1 Dallas 119; Ross v. Howell, 84 Pa. 129; Paxon v. Beans, 3 Phila. 438; Harper v. Fox, 7 W. & S. 142.

2. Executions delivered to the sheriff must be paid out of the proceeds of sale of personal property in the order in which they came into the sheriff's hands.—Taylor v. Fitzsimmons, 17 S. & R. 457; Ulrich v. Dreyer, 2 Watts 303; Shaffner v. Gilmore, 3 W. & S. 438.

ELI SAULSBURY and SAMUEL H. MILLER for James White and Harper & Bro.

1. A judgment note given by Wm. Harper without the consent of his partner cannot bind the latter or the firm.—James v. Vanzandt, 163 Pa. 171; McNoughton's Appeal, 101 Pa. 550; Walker v. Nat. Bank, 98 Pa. 574; Coffin's Appeal, 106 Pa. 280; Brightley's Dig., Vol. 4, Part 2, p. 4264; 37 Mich. 236; Bitzer v. Shunk, 1 W. & S. 340.

2. Where there is a *fi. fa.* against a firm, and an older *fi. fa.* against one of the partners, the proceeds of a sale of partnership property must be applied to the *fi. fa.* against the firm.—Coover's Appeal, 29 Pa. 1; Miller v. Miller, 3 Pa. 540; Cope's Appeal, 39 Pa. 284.

3. John White had no notice that Hazlitt's judgment was for a firm debt, and, therefore, he must have priority.—Hamilton's Appeal, 103 Pa. 368.

STATEMENT OF THE CASE.

William and John Harper, trading as Harper & Bro., were in partnership, and, on May 3, 1896, contracted a debt to Hazlitt for goods sold. Six months afterwards William Harper gave his own note for the amount, $350, with a warrant of attorney to confess, on which judgment was entered against him. On this judgment a *fi. fa.* was issued May 13, 1897, on which the goods of the firm were, on the same day, levied on. On May 14th James White, a creditor of the firm, having a judgment for $1,500 against it, issued an execution, which was likewise levied on the same goods. The sheriff made sale, at which $1,750 were bid. Hazlitt insists that the net proceeds, $1,700, be applied to his judgment until it is paid in full. White contends that his judgment must be first paid, and Harper & Bro. that Hazlitt should not be paid anything.

OPINION OF THE COURT.

The execution of Hazlitt first reached the sheriff's hands, and would therefore have precedence to the White execution, were the goods levied on equally liable to seizure under both executions.—3 Liens, 499.

The goods levied on belonged to the firm of Harper & Bro. The debt represented by the White judgment was a firm debt; the judgment and the *fi. fa.* were against the firm. It is useless to cite authorities for the principle that these goods could properly be levied on and sold for the satisfaction of that judgment.

The Hazlitt judgment is founded on a note executed by William Harper, and a warrant of attorney, thereto attached, to confess judgment against him. The judgment is against him, and not against Harper & Bro. Had it been a judgment against Harper & Bro., though confessed by him alone, it could have been executed against the firm property, if it in fact represented a firm debt.—McCleery v. Thompson, 130 Pa. 443; Boyd v. Thompson, 153 Pa. 78; Franklin v. Morris, 154 Pa. 152; McNoughton's Appeal, 101 Pa. 550; Hamilton's Appeal, 103 Pa. 368; Corson v. Beans, 3 Phila. 438; White v. Rech, 171 Pa. 82; Ross v. Howell, 84 Pa. 129; Union Pottery Co. v. Ginder, 2 Lanc. 345. On the other hand, had the judgment been against William Harper and John Harper, and not against Harper & Bro., on proof that the debt represented by it was a firm debt, firm assets could be sold on the *fi. fa.* issued upon it.—Snodgrass' Appeal, 13 Pa. 471; *In re* McHose Fund, 10 Mont. 47. The judgment on which the Hazlitt execution issued is against William Harper only, not against William Harper and John Harper, and not against Harper & Bro. Can it be satisfied out of the firm assets?

Ordinarily, on a judgment against a member of the firm, the firm assets specifically cannot be sold, but only the interest of the member.—Dengler's Appeal, 125 Pa. 12; Taylor v. Henderson, 17 S. & R. 453; Smith v. Emerson, 43 Pa. 456; Durborrow's Appeal, 84 Pa. 404; White v. Rech, 171 Pa. 82. The partners have an equity that the firm assets shall be applied to the payment of the joint debts, and to their reimbursement for advances they may have made to the business in excess of those

made by the defendant. It distinctly appears, however, that the $350, for which the Hazlitt judgment was confessed, were due to Hazlitt for goods sold by him to the partnership. Does this warrant a seizure and sale on it of the partnership assets?

If the record of the action in which the judgment is recovered shows that the debt is a partnership debt, firm property may be levied on, on the *fi. fa.* issued upon it. Thus, if, in action against four partners on a firm note, one of the partners does not appear, and a trial is had on the issue made by the others, on the judgment recovered against the others, the partnership assets can be levied on.—Taylor v. Henderson, 17 S. & R. 453. The judgment is an adjudication that the debt is a partnership debt. although it is a judgment against only some of the partners. The Hazlitt judgment is entered on a note and a warrant of attorney, which shows that the debt is the debt, not of Harper & Bro., but of William Harper. Such a judgment could be authority to sell nothing but William Harper's property, not the firm property, but only his interest therein. It is entirely clear that the assets of the partnership could not be legally sold on this judgment. The $350 may be a firm debt. As such, it has not yet been reduced to judgment. William Harper has made himself individually liable for it, and the judgment is simply an adjudication of the individual liability. The sale on this judgment alone would not have divested the ownership of the firm.—White v. Rech, 171 Pa. 82; Stevens v. Diehl, 127 Pa. 416. It follows that, as the proceeds represent the value of the firm property, they must be applied to the judgment of Jas. White. It likewise follows that the balance belongs to Harper & Bro. No definite aliquot part of it belongs to Wm. Harper. It may be that there are other debts which John Harper has a right to pay thereout. It may be that the firm is indebted to him for contributions to it in excess of his share. The balance will therefore be paid to John Harper.

The auditor's report is therefore recommitted to him, in order that he may rectify it.

THIEL'S ESTATE.

Advancement—Loan by Executor—Debts due an estate by heir—Rights of heir's judgment creditors.

RALPH H. LIGHT and CHARLES S. SHALTERS in support of the claim of Tome and Smiles.

Advancement is always a question of intention. 2 Williams on Executors, 882; Intestates act of 1833. When the testator holds a note against the legatees, the presumption is that it is a debt.—Estate of Eisenberg, 180 Pa. 125; Miller's Appeal, 107 Pa. 221; Dewee's Estate, 7 Phila. 498.

The executrix is primarily liable to the estate for the loan to the legatee.—Wilson's Appeal, 115 Pa. 95; Nyce's Estate, 5 W. & S. 254; Robins' Estate, 180 Pa. 630. The position of the executrix is that of an ordinary creditor whose equity is inferior to that of the judgment creditors.—Estate of James Cooper, 4 S. C. R. 615; Carter's Appeal, 10 Pa. 144; Siegfried's Estate, 1 Woodward 77.

HARRY M. PERSING and ARTHUR M. DEVALL *contra.*

The heir is a debtor to the estate and his debts must be deducted from his share before his other creditors can claim anything. Dickinson's Estate, 148 Pa. 142; Manifold's Estate, 5 W. & S. 340.

The Orphans' Court has no jurisdiction in cases of creditors' claims against legatees.—Ottinger's Estate, 17 C. C. 244; Carter's Appeal, 10 Pa. 144; Ditsche's Estate, 13 Phila. 288; Robinson's Estate, 12 Phila. 170. An executor may loan money belonging to the estate of the decedent.—Webster v. Spencer, 3 B. & A. 360.

OPINION OF THE COURT.

John Thiel died, leaving a widow and four sons, and property, both real and personal, to the value of $150,000. He made his widow executrix and authorized her to manage the estate until the majority of his youngest son, who at his death was 13 years old. In his will he charged as an advancement $15,000 which he had loaned on a single bill to his oldest son, William. After the will was written, he let William have an additional sum of $2,000, for which he took a judgment note. The will authorized the widow, as executrix, to pay any one of the children, in her discretion, his estimated share before the majority of the youngest. The widow lent $5,000 to William, taking his bond therefor, in which she, as executrix of the estate, is named as obligee. William became unfortunate in business and contracted debts for which judgments were recovered, one for $4,000 by

Amos Tome, and another the same day for $5,000 by Samuel Smiles. Under a power in the will, the executrix sold the testator's real estate for $60,000, of which, as widow, she was entitled during life to the interest on $20,000. The personalty had been divided among the children, William's advancement of $15,000 being deducted from his share, before the recovery of the Tome and Smiles judgments. Tome and Smiles claim $9,000 as the share of William. The brothers insist that the $2,000 debt of William, and the loan from the widow as executrix be first paid.

No complaint is made of the deduction of $15,000 from William's share of the personalty. Originally a debt, this sum was converted by the testator's will into an advancement.—Snider v. Snider, 149 Pa. 362; Patterson's Appeal, 128 Pa. 269. As however it does not appear that the statute of limitations or any other impediment would have prevented the collection of it as a debt it is unimportant whether it be considered as a debt or as an advancement.

The testator loaned $2,000 to William, taking a note for it. This sum is a debt. In the making of distribution of a decedent's estate, any debts owing to it by a legatee or distributee are to be treated as a part of the estate, and the debtor is to be considered as having received *pro tanto* his portion. The sum of $2,000 must then be added to the $40,000, in order to ascertain the estate for distribution, and of his share William must be regarded as having received so much.—Morr's Appeal, 80 Pa. 427; Springer's Appeal, 29 Pa. 208; Harman's Estate, 135 Pa. 441; Eisenbrey's Estate, 180 Pa. 125.

Two judgments have been recovered against William. Whether they are liens or not depends on his having had, at the moment of their recovery, an interest in land. The will imparts a power to sell the land to the executrix. Unfortunately, we are not informed whether it was merely a power, in whose exercise the testatrix had a free discretion, or whether it was accompanied with a peremptory direction to sell. If it was a bare power, the sons had an estate in the land until its exercise; and the judgments against William became a lien on his interest —Caldwell v. Snyder, 178 Pa. 420; Sheridan v. Sheridan, 136 Pa. 14; Peterson's Appeal, 88 Pa. 397; Darlington v. Darlington, 160 Pa. 65; 3 Liens, 264; and, as such, entitled to take what he should have otherwise received. If it was a power coupled with an absolute direction to sell, the interests of the distributees were personalty, and not therefore bound by the judgments.—1 Liens, 221; 3 Liens, 262.

Let us assume, for the present, that the power was discretionary, and, therefore, that the Tome and Smiles judgments became liens on William's share. It would still be necessary to ascertain what that share is. It would be one-fourth, but for his debts. His debts, we have seen, must be treated as advanced payments to him. The fact that judgments have been recovered does not change the principle of distribution. The lien will attach only to the actual share of William, after the deduction of his debt to the estate.—Dickinson's Estate, 148 Pa. 142; Manifold's Estate, 5 W. & S. 340. The share of William will therefore be less by $2,000, and interest, were there any on it due, than it would have been had he not owed the debt.

The will required a distribution of the estate when the youngest son should attain his majority. But it authorized an earlier distribution in the discretion of the executrix. She could, under this power, have given to a son the whole of his share in all the estate, except that in which she had a life interest, or any part thereof. She has in fact given $5,000 to William. But, she did not take his receipt for it, as a part of the estate. She took, rather, his bond, by which he bound himself to repay to her the money then received by him. It has been frequently held that a father's taking notes or bonds from his children excludes the supposition that the moneys paid to them were an advancement, unless there is other evidence.—Doty v. Doty, 155 Pa. 285; Potts' Appeal, 10 Atlan. 887; High's Appeal, 21 Pa. 283; Miller's Appeal, 40 Pa. 57; Roland v. Schrack, 29 Pa. 125; Miller's Appeal, 107 Pa. 221. The taking of this bond would indicate a loan and not an advancement.

But, the bond names Mrs. Thiel obligee "as executrix of the estate." She had the power to advance. She had no right to lend the moneys of the estate on purely personal security. We think the inference permissible that the $5,000 were given to William

in the exercise of the discretion to advance. But, let us suppose that the money was a loan. The form of the bond justifies the inference that it was a loan of money held by the lender as executrix of her husband's estate; that is, it was a loan of a portion of the assets. At the time this loan was made, so far as appears, the judgments of Tome and Stiles had not been recovered. It was necessary for them to inquire concerning debts to or advancements from the testator in his lifetime, if they desired to ascertain to what extent the lien of the judgments would be available. We see no reason why they should not be required to include in their inquiry debts to the estate afterwards. The distribution of an estate proceeds on equitable principles.—Dickinson's Estate, 148 Pa. 142. It would be inequitable to allow William to take as large a portion of the fund as if he had not borrowed $5,000 from it. This equity is as valid against those who have acquired liens on his share since it came into existence as against himself. Secret equities are valid as against judgment creditors.

The cash in hand for distribution is	$40,000 00
William's debt is	7,000 00
Total,	$47,000 00
The share of each is	$11,750 00
Payable to John,	$11,7 0 00
Payable to Charles,	11,750 00
Payable to Henry,	11,750 00
Payable to William,	4,750 00
	$40,000 00

As the judgments against William were recovered on the same day, they must be paid ratably.

To Tome, four-ninths of $4,750, or,	$2,111 10
To Smiles, five-ninths of $4,750, or,	2,638 90

The exceptions to the auditor's report are sustained, and a decree will be drawn up in conformity with this opinion.

JOHN MEYER vs. CHARLES LITTELL.

Slander—Imputation of crime—Privileged Communication.

Trespass.

DR. JOHN C. D. DAVIS and GEO. L. SCHUYLER for plaintiff.

The words of the defendant are actionable *per se*.—Act of 1860, B. Purd. Dig. 475; Bigelow on Torts, 41. The words are none the less actionable because of the expression of belief.—Dottarer v. Bushey, 16 Pa. 204; Beehler v. Steever, 2 Wh. 313; Lukehart v. Byerly, 53 Pa. 418. The statement of the defendant was made without justification.—Barr v. Moore, 87 Pa. 385; Kellogg against Cary, 3 P. & W. 102; Farley v. Ranch, 3 W. & S. 554; Stitzell v. Reynolds and Wife, 67 Pa. 54.

FRANK B. SELLERS and B. FRANK FENTON for defendant.

The words are not actionable *per se*.—13 Am. & Eng. Ency. 353. They express a mere suspicion.—Odgers on Libel and Slander, 44; Folkard's Starkie on Libel and Slander, 145; Brettun v. Anthony, 103 Mass. 37.

The communication is a qualified privileged one.—Lewis v. Chapman, 16 N. Y. 373. The contract is *uberrimae fidei*.—Richards on Insurance, p. 8; Clark on Cont. 316.

The statement was made with justification.—2 Greenleaf on Ev. 418; 13 Am. & Eng. Encyc. 413–416; Odgers on Libel and Slander, p. 159; Pollock on Torts, p. 177; Briggs v. Garrett, 111 Pa. 404.

OPINION OF THE COURT.

Meyer rented a farm from Littell "on the shares." While the grain was in the barn, Meyer obtained an insurance on his stock, his farming implements, and such of the contents of the barn as were his, and Littell procured an insurance on the barn and his share of its contents. The barn was consumed by fire and both Meyer and Littell received the amount of their policies. After the fire, Meyer remained on the premises as tenant, and Littell applied to the agent of the same insurance company for insurance on the other buildings on the farm. In the course of his conversation, Littell told the agent that he "believed the barn was set on fire." The agent replied that "if he, Littell, thought there was danger of the other buildings being set on fire, the company would not take the risk." Littell replied that he did not know about future danger, but that the bad financial circumstances of the tenant Meyer, his having just previously to the fire been given notice to quit by Littell and the fact of his having had everything he could possibly claim insured for more than its full value, "made the burning of the barn look suspicious."

The only plea entered by the defendant

is "not guilty." As, when defamatory words are spoken, they are presumed to be untrue, until their truth is established, 13 Am. & Eng. Encyc. 395, and as proof of their truth is not admissible under the plea of not guilty, Peters v. Ulmer, 74 Pa. 402; Minnesinger v. Kerr, 9 Pa. 312; Petric v. Rose, 5 W. & S. 364; Townshend, Slander and Libel, 591, all the defamatory words imputed by the declaration to the defendant must be assumed to be false. This however is not equivalent to saying that the circumstances enumerated by Littell, which are not slanderous, but which are assigned by him as the cause of his suspicion, are to be conclusively presumed to be untrue.

The alleged libel consists in the imputation to Meyer of the burning of the barn of Littell and of his own personal property, for the purpose of defrauding the insurance company. To burn the barn of another is felonious arson; 1 P. & L. 1104, if it be parcel of a dwelling. To burn it, if not parcel of a dwelling, is to commit a misdemeanor, 1 P. & L. 1105; Staeger v. Commonwealth, 103 Pa. 469. Whether a tenant in possession, if he burns the barn, burns the barn of "another," in the sense of this statute it is unnecessary to decide, 1 Wh. Crim. Law 697 (9 Edit.) The 139th section of the act of March 31, 1860, 1 P. & L. 1106, declares the setting fire by any owner, tenant or occupant to any house, barn or other building "with an intention thereby to defraud or prejudice any person, or body politic or corporate, that hath underwritten or shall underwrite any policy of insurance thereon" shall be guilty of a misdemeanor, and punished by a fine and imprisonment by separate and solitary confinement at labor. It is clear then that if the words used by the defendant import a charge of such burning, they are a slander, and actionable without proof of damage. They would attribute to the plaintiff (1) an offence which is indictable and (2) subject to infamous punishment.—Davis v. Carey, 141 Pa. 314; Andres v. Kopenhaefer, 3 S. & R. 257; 13 Am. & Eng. Encyc. 347.

But, the language of Littell does not affirm of Meyer that he set fire to the barn with intent to defraud. It alleges (1) that, in Littell's opinion, the barn was set on fire. This alone would not be slanderous, for it does not accuse any particular person, and hence, not Meyer; 13 Am. & Eng. Encyc. 386, 391; Odgers, Libel and Slander. 98. But, it further suggests (2) that certain facts concerning Meyer make the burning of the barn look suspicious. In substance Littell says that certain facts exist, and that these facts make the suspicion that Meyer set fire to the barn, reasonable. A suspicion may be without adequate objective basis. To say that facts make the burning look suspicious is to say that they warrant a suspicion.

But, are the enumeration of facts, and the declaration that these facts warrant a suspicion that a certain undisputed burning was caused by a certain person a slander? In the majority of cases, when one says that another stole, or robbed, or committed forgery or arson, he is merely expressing his conviction or belief founded on circumstances that in his opinion justify it. He is not understood to affirm that which he directly knows. He nevertheless utters a slander. So, if instead of expressing himself objectively, as, by saying that X stole, he speaks subjectively, as by saying, "I *believe* that X stole," he is none the less guilty of a slander.—Dottarer v. Bushey, 16 Pa. 204; Beehler v. Steever, 2 Wh. 313; Townshend, Slander and Libel, 174. Would he be the less guilty if at the same time he enumerated facts and stated that it was they that induced him to entertain this belief? If he states that he makes the assertion on the authority of a specified person, he does not excuse himself, Kennedy v. Gregory, 1 Binn. 85; Hersh v. Ringwalt, 3 Y. 508; Townshend, Slander & Libel, 306, and it is impossible to see how the naming of facts as the source of his inference could make the expression of the inference not actionable. In McKennon v. Greer, 2 W. 352 and Bornman v. Boyer, 3 Binn. 515, the fact was mentioned which the defendant supposed to support the accusation, but he was guilty of slander.

Now, does a defendant commit a slander when he connects the plaintiff with a crime, in the imagination of his hearer, and, in addition, shows that *he* believes the connection, and does he commit no slander if, connecting the plaintiff with the crime, he shows that he has only a suspicion? Is the presence of actionable damage to reputation dependent on the

degree of credence expressed by the defendant? It can be hardly less injurious to a man for a statement to be made, showing that in the *suspicion* of the speaker he has committed a crime, than for one to be made showing that, in his *opinion* or *belief*, he has committed it. There are authorities which hold, that when the speaker "uses words that merely disclose a suspicion that is in his mind," no action would lie without proof of special damage. —13 Am. & Eng. Encyc. 353; Townshend, Slander, 173. Other cases hold contrariwise.—Sturton v. Chaffin, Moore, 142; Drummond v. Leslie, 5 Blacks. (Ind.) 453; 13 Am. & Eng. Encyc. 390. The effect of the language of Littell was to lodge in the mind of the insurance agent a suspicion that Meyer had committed a crime, and this effect it must have been intended to produce. We think it slanderous, unless it was privileged.

Littell applied for insurance of buildings on the farm on which the barn had been recently burnt. That occurrence became naturally a topic of inquiry. Littell explained the fire by saying that it was the work of an incendiary. The agent expressed fear that other incendiary fires might destroy the buildings on which the insurance was solicited. The statement that followed may have been made for the purpose of suggesting that a repetition of the fire need not be expected because of the removal of the tenant, or it may have been made in order to candidly reveal to the agent the continuance of the danger. The jury was warranted in finding that one or the other of these purposes induced the remarks of Littell. At the trial we instructed the jury that if the words of Littell were uttered to an agent, from whom insurance was solicited, in answer to inquiries from him concerning the danger of a repetition of the fire, they were privileged, unless made without belief of their truth, or maliciously. In this we discover no error.—13 Am. & Eng. Encyc. 412; Townshend, Slander and Libel, 401; Brockerman v. Keyser, 1 Phil. 243. When the facts are established, whether they do or do not constitute a privilege is to be determined by the court.—Odgers, Libel, 139.

There was no dispute as to the utterance of the words charged to have been used by Littell. The verdict for the defendant presupposes, under the instruction of the court to the jury, that the jury found that the words were used *bona fide*, on the belief that they were germane to the business with the insurance agent; and that they were in fact germane. We see no error in the trial, and the motion for a new trial is therefore overruled.

SAMUEL MILLER, ASSIGNEE, vs. HENRY MacMILLON.

Partnership settlement—Liquidating partner—Partnership lien—Partner's lien.

Bill in equity.

FRED C. MILLER and WM. K. SHISSLER for the plaintiff.

1. The $3,000 owed by A, being owed by him in the capacity of an individual, should not be charged to his interest in the capital stock, as against the claims of his assignee.—Lindley on Partnership, sect. 354; Nichol v. Stewart, 36 Ark. 612; McCormick's Appeal, 55 Pa. 252.

The partners have a lien upon the amount, $5,000, C's share of the capital stock remaining unpaid, as against C's administrator.—Lindley on Partnership, sect. 352; Payne v. Matthews, 6 Paige 19; Deal v. Bogue, 20 Pa. 233; Appeal of York Co. Bank, 32 Pa. 446; Baker's Appeal, 21 Pa. 82; Walker v. Eyth, 25 Pa. 216.

THOS. B. PEPPER and G. FRANK WETZEL for the defendant.

In an accounting between co-partners, each is entitled to charge the other with what they have not brought in, or have taken out more than they ought.—17 Am. & Eng. Ency. 1213. Partners, in the absence of special agreement, are entitled to share losses in same proportion as they share profits.—Collyer's Law of Partnership, Vol. 1, 309; Whitcomb v. Converse, 119 Mass. 38. The assignee has no right to any part of the firm property.—Moddewell v. Keever, 8 W. & S. 63; Raymond v. Schoonover, 181 Pa. 352. The assignees of an insolvent partner must first satisfy all that is due from their assignor to the partnership.—Holderness v. Shackles, 8 B. & C. 618. Upon a dissolution, each partner has a lien upon the partnership effects. Snodgrass' Appeal, 13 Pa. 474; Bell v. Newman, 5 S. & R. 78; Doner v. Stauffer, 1 P. & W. 198–203.

STATEMENT OF THE CASE.

Henry, Thomas and George MacMillon, three brothers, were partners, doing a general merchandise business under the name

of MacMillon & Co. The capital stock was $30,000, of which each subscribed the sum of $10,000, and the partners have equal interests. Henry and Thomas have paid in the $10,000 subscribed by them. George has paid in $5,000, and given his promissory notes to the firm for the balance of his subscription, payable in equal parts, in one, two, three, four and five years, with interest. Thomas purchased from the firm, individually, goods amounting to $3,000. He becomes insolvent, and makes an assignment of his property for the benefit of creditors to Samuel Miller. George has died. Henry is the liquidating partner, and, as such, has disposed of all the firm assets, and has in his hands $13,470. The still unpaid debts of the firm are $9,470.

OPINION OF THE COURT.

The principle is not very recondite which will determine the rights of these partners *inter sese*. They held equal shares, and were equal partners. They were to share the profits and bear the losses equally. Henry has put $10,000 into the business, and retracted none of it. Thomas having paid in $10,000 has withdrawn $3,000. George has paid in only $5,000. The assets are $13,470. The unpaid debts, $9,470. These must be paid, and the liquidating partner has a right to pay them. There will remain $4,000. Of this sum, $3,000 should be paid to Henry. Henry and Thomas will then have made an equal contribution. The remaining $1,000 should be divided equally between them. They will still have contributed, each, $1,500 more than George. George then should contribute $1,000, $500 to Henry and $500 to Thomas. What each is entitled to charge on account with the others, including whatever each has brought in, whether as capital or as advances, and what each should have brought in but has not done so, and what each one has taken out more than he ought, should then be ascertained, and the profits to be divided or the losses to be made good should be apportioned, ascertaining what each must pay to the others in order to settle all cross-claims, the capital being required to be first divided and repaid to the party contributing it before before dividing, and in order to ascertain the amount of profits.—17 Am. & Eng. Encyc. 1197. Each partner has an equitable right or lien to compel the application of the assets to the joint debts, and for the recovery of the surplus due to each after the settlement of the liabilities. —17 Am. & Eng. Encyc. 1197.

It was suggested at the argument that the $3,000 withdrawn from the firm by Thomas are a debt to the firm, and that the firm should claim ratably with other creditors against his assigned estate, but that it cannot secure to itself a preference, by setting off his share in the assets of the firm against his indebtedness to it. But, this is a right which the firm has, or the other members of it, from the very relation of partners. Had Thomas not made an assignment for the benefit of his creditors, he surely could not have taken any portion of the firm assets without accounting for what he had already withdrawn. A debtor to A, who has counter-claims against A when A makes an assignment, may set off these counter-claims against the debt when the assignee attempts to collect it.—Trickett, Assignments, 26, 27; Farmers' D. N. Bank v. Penn Bank, 123 Pa. 283. At the instant of Thomas MacMillon's assignment his partners had a right to deduct so much of his share in the assets as would be necessary to reimburse the firm. The assignee for creditors is not a purchaser for value, and he has no larger right than his assignor.—Trickett, Assignments, 127. The assignee for creditors of a partner acquires no interest in the property of the firm, in specie, but only to a share of the residium, after the accounts have been settled.—Raymond v. Schoonover, 181 Pa. 352; Holderness v. Shackels, 8 B. & C. 617: Baker's Appeal, 21 Pa. 76; Deal v. Bogue, 20 Pa. 228; Doner v. Stauffer, 1 P. & W. 198.

The fund in the hands of the liquidating partner will be distributed thus:

The fund,		$13,470
Pay the debts therefrom,		9,470
Balance for distribution among partners,		$4,000
Deduct and pay to Henry,	$3,000	
Deduct and pay to Henry,	500	
	$3,500	
Deduct and pay to Thomas,	500	
		4,000

Henry has contributed,....	$10,000	
He receives,.....	3,500	
Henry's net contribution,		$6,500
Thomas has contributed,..	$10,000	
He has received,.. $3,000		
He now receives,.. 500		
	3,500	
Thomas' net contribution,		$6,500
George has contributed,...	$5,000	
George must contribute :		
To Henry, ... $500		
To Thomas,..... 500		
	1,000	

George's final contribution,		$6,000
	$3,500	
Henry's final contribution,	500	
		$6,000
	$6,500	
Thomas' final contribution, ...	500	
		$6,000

Let a decree be drawn up in conformity with this opinion.

HON. WILLIAM B. HORNBLOWER.